

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

JEFFREY SEMLER,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-11-1354-D
)	
GEICO GENERAL INSURANCE)	
COMPANY,)	
)	
Defendant.)	

FINAL PRETRIAL REPORT

All counsel who will appear at trial:

Appearing for **Plaintiff**: Tye H. Smith, Esq.
CARR & CARR
1350 S.W. 89th Street
Oklahoma City, OK 73159
405/234-2110
405/234-2128 (Fax)
tsmith@carrcarrokc.com

Appearing for **Defendant**: Gerard F. Pignato, Esq.
Paul M. Kolker, Esq.
PIGNATO COOPER KOLKER & ROBERSON
119 N. Robinson Avenue, 11th Floor
Oklahoma City, OK 73102
405/606-3333
405/606-3334 (Fax)
jerry@pclaw.org
paul@pclaw.org

JURY TRIAL DEMANDED.

1. **BRIEF PRELIMINARY STATEMENT.** State briefly and in ordinary language the facts and positions of the parties (appropriate for use during jury selection in jury cases).

The parties in this case are the plaintiff, Jeffrey Semler, and the defendant, GEICO General Insurance Company (hereinafter referred to as GEICO). The parties agree that GEICO was Jeffrey Semler's automobile insurer on August 25, 2010. The parties also agree that Jeffrey Semler's automobile insurance policy with GEICO included uninsured motorist coverage. The parties also agree that the uninsured motorist coverage with GEICO provided coverage for any damages suffered by Jeffrey Semler as a result of any personal injuries Jeffrey Semler may suffer as a result of the negligent ownership, maintenance or use of a motor vehicle, if the owner or operator of the motor vehicle is either uninsured or cannot be identified. The parties also agree that Jeffrey Semler was involved in a motor vehicle accident on the night of August 25, 2010. The parties agree that the accident took place after dark while Jeffrey Semler was driving his 2005 Ford Expedition east on Highway 3 in Canadian County, Oklahoma as he approached a bridge. The parties agree that a tire tread was found in Jeffrey Semler's lane of travel immediately after the accident occurred. The parties further agree that Jeffrey Semler suffered injury as a result of the accident.

Plaintiff, Jeffrey Semler, claims that the collision occurred due to the negligence of an unidentified large commercial truck or semi-tractor/trailer. As a result, Jeffrey Semler claims his vehicle impacted the tire tread and was thrown into a guardrail and caused him to spin off the roadway and suffer a broken finger, a lacerated hand and injuries to his back and neck. Jeffrey Semler claims that as a result of the negligence of the unknown vehicle's owner or operator, he suffered personal injuries for which his insurance company, GEICO, is obligated to pay him under the terms of his policy with GEICO.

GEICO denies these allegations and claims that Jeffrey Semler cannot prove that the unidentified truck was a hit and run motor vehicle, or that he was injured due to the negligence of an unidentified owner or operator of a motor vehicle. GEICO claims that Jeffrey Semler's own negligence was the sole cause of the accident and that his back injuries were not caused by the accident of August 25, 2010. Specifically, GEICO contends that, at best, Plaintiff's lumbar injury constitutes an aggravation of a preexisting condition.

2. **JURISDICTION.** The basis on which the jurisdiction of the Court is invoked.

This case was removed to this Court pursuant to 28 U.S.C. §1441 and §1446. Jurisdiction is proper pursuant to 28 U.S.C. §1441(a) on the grounds that the Federal Court has diversity jurisdiction under 28 U.S.C. §1332.

3. **STIPULATED FACTS.** List stipulations as to all facts that are not disputed or reasonably disputable, including jurisdictional facts.

- A. Venue is proper.
- B. Plaintiff was involved in an automobile accident on August 25, 2010.
- C. At the time of Plaintiff's accident, Plaintiff had in force a policy of insurance issued by GEICO which provided uninsured motorists coverage benefits to Plaintiff.
- D. Jeffrey Semler sustained some degree of injury in the accident.
- E. The collision occurred at approximately 11 pm.
- F. A tire tread was found in the roadway immediately after the accident occurred.
- G. No vehicle or driver was ever identified as leaving the tire tread in the roadway.
- H. Geico's insurance policy with Jeffrey Semler states: Under the Uninsured Motorists Coverage, we will pay damages for bodily injury caused by accident which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle or a hit-and-run motor vehicle arising out of the ownership, maintenance or use of that auto. The amount of the insured's recovery for these damages will be determined by agreement between the insured or his representative and GEICO.

Hit-and-run motor vehicle is a motor vehicle causing bodily injury to an insured, and whose owner or operator cannot be identified.

(This stipulation is for the Court only and not to be disclosed to the jury)
In addition to Stipulation H, Geico's insurance policy with Jeffrey Semler states:

The dispute may be arbitrated if an agreement cannot be reached.

- 4. **LEGAL ISSUES.** State separately, and by party, each disputed legal issue and the authority relied upon.

- A. Pending Motions *in Limine*.

- B. Scope of *Voir Dire* and incorporation of proposed *voir dire* questions submitted by the parties.
- C. Plaintiff believes a legal issue exists regarding how the jury should be instructed on the issue of what constitutes a “hit-and-run motor vehicle”. To avoid confusion by the jury, since one of the primary issues in this case is whether Plaintiff suffered injury as a result of a “hit-and-run motor vehicle”, based upon the Oklahoma Supreme Court’s ruling in *Biggs v State Farm*, the Court should instruct the jury that “hit-and-run” does not require any actual physical impact between an unidentified vehicle and the Plaintiff’s vehicle per the requested jury instruction submitted by the Plaintiff.

5. **CONTENTIONS AND CLAIMS FOR DAMAGES OR OTHER RELIEF SOUGHT.**

Plaintiff: Plaintiff is entitled to an award in his favor against Defendant for:

- A. Damages Plaintiff has suffered as a result of the negligence and/or negligence per se of the owner and/or operator of an unidentified vehicle, consisting of:
 - 1. Past and future mental and physical pain and suffering;
 - 2. Past and future physical pain and suffering;
 - 3. Temporary and permanent injuries;
 - 4. Loss of enjoyment of life;
 - 5. Aggravation of a pre-existing condition;
 - 6. Physical impairment; and
 - 7. Past and future medical expenses.

- B. Defendant’s breach of the insurance contract.

Defendant:

- A. GEICO denies it has breached its contract with Plaintiff.
- B. GEICO contends that the unidentified truck was not a hit-and-run motor vehicle.
- C. The evidence does not demonstrate that Plaintiff’s accident was caused as a result of the negligence of a hit-and-run motor vehicle.

- D. The evidence does not demonstrate that the tire tread separated from a tire due to negligent maintenance of the tire by ~~the owner or operator~~ of a hit-and-run motor vehicle.
 - E. The evidence does not demonstrate that the operator of the hit-and-run motor vehicle knew or should have known that he/she lost a tire tread that was eventually struck by the Plaintiff.
 - F. The evidence demonstrates that the subject accident was proximately caused as a result of the negligence of the Plaintiff in failing to pay attention to the roadway and in driving at an excessive speed.
 - G. The evidence demonstrates that any injury suffered by Plaintiff as a result of this accident would have been avoided if Plaintiff had properly reacted to the tire tread lying in the roadway before and after he struck it.
 - H. The evidence will demonstrate Plaintiff had preexisting conditions and injuries involving the same body parts at issue in the present case. As such, Plaintiff cannot show that it is more probable than not that his claims of injury were caused by the accident of August 25, 2010.
 - I. The evidence does not demonstrate that Plaintiff suffered a new back injury as a result of the accident of August 25, 2010.
 - J. The evidence demonstrates that any alleged injuries Plaintiff claims to have suffered to his lumbar spine in the accident of August 25, 2010 were not permanent and have fully resolved.
 - K. At best, Plaintiff's lumbar injury constitutes an aggravation of a pre-existing condition.
 - L. GEICO has filed several Motions in Limine. GEICO adopts and incorporates the arguments set forth in those Motions in Limine as though fully set forth herein.
6. **EXHIBITS.** The following exclusionary language **MUST** be included:
- Unlisted exhibits will not be admitted unless, by order of the court, the final pretrial order is amended to include them.

A. **Plaintiff**: (Premarked for trial and exchanged as required under LCvR 39.4(a))

No.	Title/Description	Doc. ID No.	Objection
1.	Schedule A - List of Medical Bills of Jeffrey Semler		402
2.	Medical Bills of Jeffrey Semler	001 - 002 003 004 005 - 007 008 009 - 011 015 012	402
3.	Schedule B - List of Medical Records of Jeffrey Semler		402
4.	Medical Records of Jeffrey Semler	2129 - 2136 2017 - 2053 2000 - 2016 2056 - 2075 2076 - 2079 2080 - 2090 2091 2092 2093 - 2094 2101 - 2104 2095 - 2100	402
5.	Larry Owen Photographs	4053 - 4061	See GEICO's Motion in Limine [DOC. No. 121].
6.	Bill Uselton Photographs	4003 - 4010	
7.	Photographs of Plaintiff's Vehicle	4000 - 4002	

B. **Defendant:** (Premarked for trial and exchanged as required under LCvR 39.4(a))

No.	TITLE/DESCRIPTION	DOC. ID No.	OBJECTION
1.	GEICO insurance policy, less the dec page	DEFENDANT'S TRIAL EXHIBIT 01 001-024	None per agreement with Defense Counsel as to limited policy provisions to be submitted
2.	Plaintiff's pre-accident medical records from Alexander L'Heureux, M.D.	DEFENDANT'S TRIAL EXHIBIT 02 001-016	
3.	Plaintiff's pre-accident medical records from Springs Internal Medicine	DEFENDANT'S TRIAL EXHIBIT 03 001-003	Plaintiff objects to the lower half of page 002 of this exhibit being included as a "pre-accident" medical record as that note (hand-written notes regarding prescriptions) was created after the accident as confirmed by the corresponding prescription record dated 3/07/11 found at Defendant's Exhibit 22-001
4.	Withdrawn		
5.	Curriculum Vitae of Alexander L'Heureux, M.D.	DEFENDANT'S TRIAL EXHIBIT 05 001-005	
6.	Withdrawn		
7.	Withdrawn		
8.	Transcript of Plaintiff's recorded statement taken on December 20, 2010	DEFENDANT'S TRIAL EXHIBIT 08 001-005	Potentially proper for impeachment only. Otherwise, cumulative, irrelevant, misleading, unfairly prejudicial Fed. R. Evid. 401, 402, 403

NO.	TITLE/DESCRIPTION	DOC. ID No.	OBJECTION
9.	Audio from Plaintiff's recorded statement taken on December 20, 2010	DEFENDANT'S TRIAL EXHIBIT 09 001	Potentially proper for impeachment only. Otherwise, cumulative, irrelevant, misleading, unfairly prejudicial Fed. R. Evid. 401, 402, 403
10.	Photographs of Plaintiff's vehicle	DEFENDANT'S TRIAL EXHIBIT 10 001-006	
11.	Daytime photographs of accident scene taken by Larry Owen	DEFENDANT'S TRIAL EXHIBIT 11 001-005	
12.	Daytime photographs of accident scene taken by William Kennedy, P.A.	DEFENDANT'S TRIAL EXHIBIT 12 001-003	
13.	Nighttime photographs of accident at night William Kennedy, P.A.	DEFENDANT'S TRIAL EXHIBIT 13 001-002	Relevance, unfairly prejudicial, confusing, misleading, authenticity. Fed. R. Evid. 401, 402, 403, 901
14.	Diagram/aerial view of accident scene created by William Kennedy, P.A.	DEFENDANT'S TRIAL EXHIBIT 14 001	
15.	Plaintiff's MRI report from Vantage Diagnostic Imaging dated September 15, 2010	DEFENDANT'S TRIAL EXHIBIT 15 001-002	
16.	Plaintiff's MRI films from Vantage Diagnostic Imaging, dated September 15, 2010	DEFENDANT'S TRIAL EXHIBIT 16 001-023	Plaintiff objects to images on CD being given to jury as improper
17.	Curriculum Vitae of William Kennedy, P.A.	DEFENDANT'S TRIAL EXHIBIT 17 001-002	
18.	Withdrawn		
19.	GEICO Activity Log note, dated August 27, 2010	DEFENDANT'S TRIAL EXHIBIT	This exhibit is inadmissible as

No.	TITLE/DESCRIPTION	Doc. ID No.	OBJECTION
		19 001	irrelevant, confusing, cumulative, misleading, unfairly prejudicial, authenticity, hearsay. Fed. R. Evid. 401, 402, 403, 801, 802, 901; see Motion in Limine too
20.	Plaintiff's post-accident medical records from Integris Bass Baptist Hospital	DEFENDANT'S TRIAL EXHIBIT 20 001-007	
21.	Plaintiff's post-accident medical records from Accident Care and Treatment Centers	DEFENDANT'S TRIAL EXHIBIT 21 001	
22.	Plaintiff's pharmacy records from Medic Pharmacy	DEFENDANT'S TRIAL EXHIBIT 22 001-008	
23.	Plaintiff's x-ray films from Alexander L'Heureux, M.D., dated January 12, 2006	DEFENDANT'S TRIAL EXHIBIT 23 001-002	No objection to prints. Plaintiff objects to images on CD being given to jury as improper
24.	Plaintiff's x-ray films from Alexander L'Heureux, M.D., dated July 16, 2013	DEFENDANT'S TRIAL EXHIBIT 24 001-002	No objection to prints. Plaintiff objects to images on CD being given to jury as improper
25.	Withdrawn		
26.	Withdrawn		
27.	Commercial Medium Tire Debris Study published by the U.S. Department of Transportation, dated December 2008	DEFENDANT'S TRIAL EXHIBIT 27 001-235	No objection to proper use at trial pursuant to FRE 803(18), but should not be admitted

7. **WITNESSES**: The following exclusionary language **MUST** be included:

Unlisted witnesses in chief will not be permitted to testify unless, by order of the court, the final pretrial order is amended to include them.

A. **Plaintiff:**

NO.	NAME/ADDRESS	PROPOSED TESTIMONY
1.	Jeffrey Semler c/o Tye H. Smith Carr & Carr 1350 S.W. 89th Street Oklahoma City, OK 73159	Facts and circumstances of collision and damages.
2.	Tamela Semler c/o Tye H. Smith, Esq. CARR & CARR 1350 S.W. 89th Street Oklahoma City, OK 73159	Facts and circumstances of collision and plaintiff's damages.
3.	Trooper Dallas Edwards Oklahoma Highway Patrol Troop A, 2480 W. I-240 Frontage Road Oklahoma City, OK 73159	Knowledge regarding facts and circumstances of this collision, the collision scene and surrounding area
4.	David Craig 3520 N.W. Expressway Okarche, OK 73762	Knowledge regarding facts and circumstances of this collision, the collision scene and surrounding area
5.	Larry Owen 1745 W. Burr Oak Road Norman, OK 73072	Accident reconstruction. Deposed. See Expert Report and deposition.
6.	Bill Uselton 11409 Mackel Drive Oklahoma City, OK 73170	Trucking expert. Deposed. See Expert Report and deposition.
7.	Dr. Scott Mitchell, DO Oklahoma City, OK	Video Deposition. Plaintiff's diagnosis, care and treatment.
8.	Carrie Sigler (or any other GEICO representative who sponsors Defendant's Exhibit 19)	Defendant's position on facts and issues in case; Answer questions about Defendant's Exhibit 19
9.	GEICO representative at counsel table	Defendant's position on facts and issues in case; Answer questions about Defendant's Exhibit 19

B. Defendant:

NO.	NAME/ADDRESS	PROPOSED TESTIMONY
1.	David Craig Post Office Box 70 Okarche, Oklahoma 73762	Recorded statement; appeared upon the scene of the accident shortly thereafter; conversation with Plaintiff; observation of tire tread.
2.	Gary Bolden Standards Testing Laboratories, Inc. Post Office Box 758 1845 Harsh Avenue SE Massillon, Ohio 44648	Cause of tire tread separations; see Expert Report dated May 16, 2012
3.	Gary Janzen 7517 Northwest 28th Street Bethany, Oklahoma 73008	Question whether a truck driver always or usually knows he/she has lost a tire tread on a trailer. See Expert Report dated May 16, 2012.
4.	William Kennedy 233 South Lulu Wichita, Kansas 67211	Expert accident reconstructionist. See Expert Report dated May 16, 2012.
5.	E. Alexander L'Heureux, Jr., M.D. 1405 Northwest 150th Street Edmond, Oklahoma 73013	Nature, extent and causation of Plaintiff's alleged injuries as set forth in his Expert Report dated July 16, 2013. Trial deposition obtained on October 9, 2013.
6.	Carrie Sigler GEICO Dallas, Texas	Identification and authentication of GEICO activity log note dated August 27, 2010
7.	Richard Ingling GEICO Dallas, Texas	Identification and authentication of GEICO activity log note dated August 27, 2010

8. ESTIMATED TRIAL TIME:

A. Plaintiff's Case: Two (2) days.

B. Defendant's Case: One (1) day.

9. **BIFURCATION REQUESTED:** Not applicable.
10. **POSSIBILITY OF SETTLEMENT:** Poor.

All parties approve this report and understand and agree that this report supersedes all pleadings, shall govern the conduct of the trial, and shall not be amended except by order of the Court.

/s/ Tye H. Smith

Tye H. Smith, OBA #14595
CARR & CARR
1350 S.W. 89th Street
Oklahoma City, OK 73159
405/234-2110
405/234-2128 (Fax)
tsmith@carrcarrokc.com

COUNSEL FOR PLAINTIFF

/s/ Gerard F. Pignato

Gerard F. Pignato, OBA #11473
Paul M. Kolker, OBA #
PIGNATO COOPER KOLKER & ROBERSON
119 N. Robinson Avenue, 11th Floor
Oklahoma City, OK 73102
405/606-3333
405/606-3334 (Fax)
jerry@pclaw.org
paul@pclaw.org

COUNSEL FOR DEFENDANT